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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

Indiezone, Inc., a Delaware corporation, and EoBuy, Limited an Irish private limited company, Case No: CV 13-04280 YGR/EDL

Plaintiffs,

Hearing Date: February 18, 2014
Hearing Time: 2:00 p.m.
Place: Oakland Courthouse
Courtroom: 5, Second Floor

Todd Rooke, Joe Rogness, Phil Hazel, Sam Ashkar, Holly Oliver and U.S. Bank, collectively the *RICO Defendants*:

MOTION TO COMPEL ARBITRATION WITH
INDIEZONE, INC. - Case No: CV 13-04280
YGR/EDL

1 Jingit LLC, Jingit Holdings, LLC, Jingit Financial
2 Services LLC., Music.Me, LLC., Tony Abena, John E.
3 Fleming, Dan Frawley, Dave Moorehouse II, Chris
4 Ohlsen, Justin James, Shannon Davis, Chris Karls in
their capacities as officers, agents and/or employees of
Jingit LLC, ***Defendants in Negligence, and***
Aiding/Abetting;

5 Wal-Mart, General Electric, Target, DOE(s) and
6 ROE(s) 1 through 10, ***Defendants in Negligence***
Secondary-Vicarious Infringement,

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8 Defendants.
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**MOTION OF DEFENDANTS ROOKE
AND ROGNESS TO COMPEL
ARBITRATION WITH INDIEZONE,
INC., DISMISS PLAINTIFF EOBUY,
LIMITED AND MOTION OF
REMAINING DEFENDANTS TO STAY
ALL REMAINING PROCEEDINGS**

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NOTICE OF MOTION

Please take notice that on February 18, 2014, at 2:00 p.m., or as soon thereafter as counsel may be heard, at the Oakland Courthouse, Courtroom 5, Second Floor, before the Honorable Yvonne Gonzalez Rogers, Judge of the United States District Court for the District of Northern California, Defendants will move for an order compelling arbitration with Indiezone, Inc., dismissing eoBuy, Limited, and staying the remaining proceedings pending arbitration.

MOTION

Defendants Todd Rooke and Joe Rogness move the Honorable Yvonne Gonzalez Rogers to compel arbitration of all claims against them by Plaintiff Indiezone, Inc. pursuant to 9 U.S.C. § 2 and the binding arbitration clause in their Indiezone Employee Agreements. Defendants Todd Rooke, Joe Rogness, Jingit, LLC, Jingit Holdings, LLC, Jingit Financial Services, LLC, Sam Ashkar, Phil Hazel, Holly Oliver, Shannon Davis, Justin James, Chris Ohlsen, Dan Frawley, Dave Moorehouse II, Tony Abena, Chris Karls, John E. Fleming, and Music.Me, LLC move to dismiss eoBuy, Limited pursuant to Fed. R. Civ. P. 17(b)(2) and 12(b)(6) because it is a defunct Irish corporation with no capacity to sue.¹ Finally, all served Defendants except Rooke and Rogness move to stay the remaining claims against them pending the outcome of the arbitration against Rooke and Rogness pursuant to 9 U.S.C. § 3 because all claims against all other Defendants are wholly dependent on Indiezone's arbitrable claims that the Rooke and Rogness misappropriated trade secrets or other proprietary information of Plaintiffs. The motions are based on the files, records, and proceedings herein, the arguments and any supporting affidavits made hereto, arguments of counsel to be made before the Court, Fed. R. Civ. P. 12(b) and 17(a) and 9 U.S.C. §§ 2 & 3.

¹ Defendants Walmart, General Electric and Target have not yet been served with the Complaint and are not parties to this motion. Defendant U.S. Bank N.A. separately joins the motion to stay all proceedings against it pending the outcome of the Indiezone arbitration.

STATEMENT OF ISSUES TO BE DECIDED

1. Do the Employee Agreements between Plaintiff Indiezone, Inc. and Defendants Todd Rooke and Joe Rogness mandate arbitration of the claims between these parties?
2. Does Plaintiff eoBuy, Limited lack capacity to bring suit because it is a dissolved Irish corporation, or, alternatively, would it be likewise compelled to arbitrate all claims against Rooke/Rogness?
3. Should the Court stay all remaining proceedings between Plaintiffs and the non-Rooke/Rogness moving Defendants pending the outcome of the arbitration between Indiezone, Rooke and Rogness?

INTRODUCTION

Plaintiffs' Complaint is prolix, but at its core alleges that Defendants Todd Rooke ("Rooke") and Joe Rogness ("Rogness"), while employed by Indiezone, Inc. ("Indiezone"), misappropriated Indiezone's and eoBuy's intellectual property and later misused it in the operation of a new company, Jingit, LLC. The very first paragraph of the Complaint explains "[t]he claims presented in this Complaint comprise allegations of a criminal agreement, a conspiracy, involving the ... theft of Plaintiff eoBuy's and Plaintiff Indiezone's ... intellectual property...." (Compl. ¶ 1.) From this garden variety tort claim, Plaintiffs have concocted a fantastical theory that Jingit, and all its independent vendors and bankers somehow participated in a criminal conspiracy, including violations of the federal Racketeering Influence and Corrupt Organizations Act ("RICO"), by entering into sponsorship or other contracts with Jingit.

While the claims in Plaintiffs' Complaint contain a litany of pleading defects too numerous to catalogue, it is not necessary at this juncture for the Court to go through the time consuming process of having to address those issues. That is because this entire case may be summarily disposed based upon three basic and inviolable legal grounds.

First, all claims asserted against Rogness and Rooke, former Indiezone employees, are subject to mandatory arbitration. Every single claim in the Complaint derives from the central allegation in paragraph 1 that, while employed by Indiezone, Rooke and Rogness allegedly

1 misappropriated information from Indiezone and its joint venture partner, eoBuy, Limited
 2 (“eoBuy”). Rooke and Rogness each executed Employee Agreements with Indiezone containing
 3 both confidentiality provisions prohibiting Rooke and Rogness from misappropriating confidential
 4 information and a broad arbitration clause providing for mandatory arbitration of all claims arising
 5 out of or relating to the Employee Agreements or any breach thereof. (Compl. ¶ 116.) Because
 6 every single claim rests on a theory that Rooke and Rogness misappropriated confidential
 7 information, all claims asserted by Indiezone against Rooke and Rogness are therefore subject to
 8 mandatory arbitration pursuant to 9 U.S.C. § 2.

10 Concededly, Rooke and Rogness did not enter into these employee agreements with
 11 Indiezone’s joint venture partner, eoBuy. Eobuy, however, is indisputably a dissolved Irish
 12 corporation and therefore lacks the capacity to sue under Irish law. *See Declaration of Brian Walker*
 13 (“Walker Decl.”). Pursuant to Fed. R. Civ. P. 17(b) and well settled federal law, eoBuy therefore
 14 lacks capacity to bring suit in any United States District Court. As a result, all claims brought by it
 15 should be dismissed pursuant to Fed. R. Civ. P. 17(b)(2) and 12(b)(6). Even if eoBuy had capacity
 16 to sue, it should also be compelled to arbitrate because by Plaintiffs’ own admission it is a joint
 17 venturer with Indiezone, and it is estopped from avoiding arbitration because it too asserts breaches
 18 of the Indiezone employee agreements against Rooke and Rogness that contain the binding
 19 arbitration clause.
 20

21 Finally, Indiezone’s claims against the remaining moving Defendants should be stayed
 22 pending the arbitration because they too rely entirely on the allegation that Rooke and Rogness
 23 misappropriated Plaintiffs’ intellectual property, the very subject of the mandatory arbitration
 24 between Indiezone, Rooke and Rogness. Where non-arbitrable claims against third parties are
 25 dependent on the outcome of arbitrable claims between other parties, federal courts routinely stay
 26 litigation of the non-arbitrable claims to preserve judicial resources, avoid the risk of inconsistent
 27 litigation, and prevent parties from being compelled to arbitrate the same claims in two different forums.
 28

1 results, and adhere to the deference to arbitration proceedings mandated by the Federal Arbitration
 2 Act. Thus, the claims against all remaining Defendants should be stayed pending the outcome of the
 3 arbitration between Indiezone, Rooke and Rogness.

STATEMENT OF FACTS

5 Rooke and Rogness are Co-Founders and Co-CEOs of Defendant Jingit, LLC, a company
 6 that facilitates electronic payments between retailers or brands and consumers when consumers
 7 watch online advertisements and engage with and purchase products in stores. (Compl. ¶¶ 28-31 &
 8 37; *see also* <https://www.jingit.com/home/how-jingit-works/>.)² They are also former employees of
 9 Indiezone. (*Id.* ¶¶ 116-17.) According to the Complaint, eoBuy's business consisted of licensing a
 10 “payment processing and content monetization platform … which enables … real-time settlement of
 11 fractional transactions in amounts less than .99 cents via the internet for sale of digital content.” (*Id.*
 12 ¶ 7.) Indiezone began sometime between 2006 and 2008 as “a development division/arm of
 13 [eoBuy].” (*Id.* ¶ 90.) Around December 2006, eoBuy decided to license its technology “in a joint
 14 venture … for the sales and purchases in fractional amounts for digital music content with a new
 15 entity [also] to be named Indiezone.” (*Id.* ¶¶ 109-10.) In May 2007, eoBuy created Indiezone, LLC
 16 under Delaware law and granted it a license of eoBuy technology for financial transactions. (*Id.*
 17 ¶¶ 114 & 122.) Plaintiffs describe Indiezone’s business as an “Ad-Engine” used for digital
 18 distribution of products such as music. (*Id.* ¶ 13.) The Complaint does not allege that eoBuy or
 19 Indiezone ever actually conducted any business—only that eoBuy licensed a technology to
 20 Indiezone for a joint venture. (*Id.* ¶¶ 90-186.) Plaintiffs claim the alleged theft of intellectual
 21 property by Rooke and Rogness prevented Indiezone from “raising investment funds.” (*Id.* ¶ 185.)

22 **I. Rooke and Rogness Executed Employee Agreements with Indiezone Containing
 23 Mandatory Arbitration Provisions.**

24
 25 ² The jingit.com website is repeatedly referenced in the Complaint and may therefore be cited
 26 herein. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1022 (N.D. Cal. 2012).

1 The Complaint alleges that Indiezone required Rooke and Rogness to execute Employee
 2 Agreements at the commencement of their employment. (Compl. ¶ 116.) Rooke and Rogness
 3 executed their agreements with Indiezone on February 27, 2008, and November 28, 2007,
 4 respectively. (Declaration of Todd Rooke (“Rooke Decl.”), Ex. A; Declaration of Joe Rogness
 5 (“Rogness Decl.”), Ex. A.)³ Both agreements contain the identical provision compelling mandatory
 6 and exclusive arbitration of all disputes:

8 **Arbitration.** You and the Company shall submit to mandatory and exclusive
 9 binding arbitration of any controversy or claim arising out of, or relating to, this
 10 Agreement or any breach hereof, provided, however, that the parties retain their
 11 right to, and shall not be prohibited, limited or in any other way restricted from,
 12 seeking or obtaining equitable relief from a court having jurisdiction over the
 13 parties. Such arbitration shall be governed by the Federal Arbitration Act and
 14 conducted through the American Arbitration Association in the State of
 15 California, Santa Clara County, before a single neutral arbitrator, in accordance
 16 with the National Rules for the Resolution of Employment Disputes of the
 17 American Arbitration Association in effect at that time. The parties may conduct
 18 only essential discovery prior to the hearing, as defined by the AAA arbitrator.
 19 The arbitrator shall issue a written decision that contains the essential findings and
 20 conclusions on which the decision is based. You shall bear only those costs of
 21 arbitration you would otherwise bear had you brought a claim covered by this
 22 Agreement in court. Judgment upon the determination or award rendered by the
 23 arbitrator may be entered in any court having jurisdiction thereof.

24 (*Id.* ¶ 7) (emphasis in original). The Employee Agreements also contain a confidentiality provision
 25 prohibiting Rooke and Rogness from competing with Indiezone and requiring them to sign an
 26 Employee Invention Assignment and Confidentiality Agreement. (*Id.* ¶ 3.) The latter agreement
 27 required Rooke and Rogness to keep all Indiezone proprietary information confidential both during
 28 and after their employment. (Rooke Decl., Ex. B ¶ 7.)

24 **II. Plaintiffs’ Complaint.**

25 ³ Because the Complaint refers to the Employee Agreements, they are incorporated by
 26 reference and may be considered by the Court in a motion to compel arbitration. Even if the
 27 agreements were not referenced in the Complaint the Court could still consider them in a motion to
 28 compel arbitration. *See Ramirez v. Freescore, LLC*, No. 8:11-cv-0720, 2011 U.S. Dist. LEXIS
 97374, at *4 (C.D. Cal. Aug. 30, 2011).

1 Plaintiffs Indiezone and eoBuy filed the Complaint in the current litigation on September 16,
 2 2013. (Compl., ECF 1.) The Complaint includes twenty-seven causes of action, (*id.* ¶¶ 266-
 3 492), each of which rests on the fundamental allegation that Rooke and Rogness stole Plaintiffs'
 4 alleged intellectual property while they worked for Indiezone, and later misappropriated it in their
 5 operation of Jingit (*see, e.g., id.* ¶¶ 1-5).⁴ The first paragraph explains “[t]he claims presented in this
 6 Complaint comprise allegations of a criminal agreement, a conspiracy, involving the ... theft of
 7 Plaintiff eoBuy's and Plaintiff Indiezone's ... intellectual property....” (*Id.* ¶ 1.)

8 While the Complaint is brought against twenty-one different Defendants, twelve of these are
 9 “Aiding/Abetting” Defendants,⁵ and three more are “Secondary-Vicarious Infringement”
 10 Defendants.⁶ (*Id.* ¶¶ 36-51.) The “Aiding/Abetting” Defendants are alleged to be “vehicles for ...
 11 the operations of the affairs of the Jingit Enterprise in raising capital and illegally deploying
 12 Plaintiffs [sic] IP on the Jingit.com Website.” (*Id.* ¶ 247.) The “Secondary-Vicarious Infringement”
 13 Defendants simply entered into sponsorship agreements with Jingit, which allegedly “facilitated the
 14 infringement of Plaintiffs' IP.” (*Id.* ¶¶ 259-60.)

15 Only Defendants Rooke, Rogness, Phil Hazel, Sam Ashkar, Holly Oliver and U.S. Bank are
 16 designated as the “RICO Defendants.” (*Id.*) Of the “RICO Defendants,” only Rooke and Rogness
 17 are alleged to have had access to, and misappropriated, Plaintiffs’ intellectual property, and they are
 18 the only Defendants who worked for Plaintiffs. (*Id.* ¶¶ 91, 150 & 154.) The remaining “RICO
 19

20 ⁴ Exhibit A to the Declaration of Alain M. Baudry (“Baudry Decl.”) is a copy of Plaintiffs'
 21 Complaint with paragraphs highlighted within every cause of action demonstrating how each rests
 22 on the fundamental claim that Rooke and Rogness allegedly misappropriated Plaintiffs' intellectual
 23 property.

24 ⁵ The “Aiding/Abetting” Defendants are Jingit, LLC, Jingit Holdings, LLC, Jingit Financial
 25 Services, LLC, Music.Me, LLC, and Tony Abena, John E. Fleming, Dan Frawley, Dave
 26 Moorehouse II, Chris Ohlsen, Justin James, Shannon Davis and Chris Karls in their capacities as
 27 officers, agents and/or employees of Jingit LLC. (Compl. ¶¶ 36-47.)

28 ⁶ The “Secondary-Vicarious Infringement” Defendants are Wal-Mart, General Electric,
 Target, DOE(s) and ROE(s) 1 through 10. (Compl. ¶¶ 48-51.) They have not been served and are
 not part of this current motion.

1 Defendants” allegedly “promot[ed] the carrying on of the IP theft” and participat[ed] in financial
 2 transactions “arising from the theft of Plaintiffs’ IP.” (*Id.* ¶ 200.)

3 **III. EoBuy is a Dissolved Corporation Under Irish Law.**

4 Plaintiff eoBuy, Limited was an Irish private limited company. (Compl. ¶ 26.) However, it
 5 was formally dissolved from the Irish Registrar of Companies as of April 4, 2008, almost six years
 6 ago. (Declaration of Brian Walker (“Walker Decl.”) ¶¶ 5-7, Ex. A.) The fact of eoBuy’s dissolution
 7 is reflected in the public records of the Irish Registrar, and may also be independently verified by the
 8 Court by entering the name “eoBuy” into the Registrar’s public website, available at
 9 www.cro.ie/search. (Walker Decl., ¶ 6 & Ex. A.)

10 **ARGUMENT**

11 **I. This Court Should Compel Arbitration Between Indiezone and Rooke and Rogness.**

12 **A. Federal Policy Favors Arbitration and All Doubts Are to Be Resolved in Favor
 13 of Arbitration.**

14 “The Federal Arbitration Act ... reflects a liberal federal policy favoring arbitration and
 15 requires federal courts to compel arbitration of any claim covered by a written and enforceable
 16 arbitration agreement.” *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 836 (N.D.
 17 Cal. 2013) (citing *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745-47 (2011) (citation
 18 omitted)). “The standard for demonstrating arbitrability is not high. The Supreme Court has held
 19 that the FAA leaves no place for the exercise of discretion by a district court, but instead mandates
 20 that the district courts direct parties to proceed to arbitration on issues as to which an arbitration
 21 agreement has been signed.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999) (citing
 22 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)). Arbitration agreements “are to be
 23 rigorously enforced.... [T]he district court can determine only whether a written arbitration
 24 agreement exists, and if it does, enforce it in accordance with its terms.” *Id.* (citing *Howard Elec. &*
 25 *Mech. v. Briscoe Co.*, 754 F.2d 847, 849 (9th Cir. 1985)). “Because of the strong policy favoring
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1 arbitration, doubts are to be resolved in favor of the party moving to compel arbitration.” *Ulbrich v.*
 2 *Overstock.com, Inc.*, 887 F. Supp. 2d 924, 929 (N.D. Cal. 2012) (citing *Moses H. Cone Memorial*
 3 *Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Given the strong federal policy in favor of
 4 arbitration there can be no real dispute that every claim in the Complaint asserted against both Rooke
 5 and Rogness is subject to mandatory arbitration.⁷
 6

7 **B. Rooke and Rogness’ Employee Agreements with Indiezone Contain Valid**
 Arbitration Provisions Compelling Mandatory and Exclusive Arbitration of All
 Disputes.

9 Both Rooke and Rogness’ Employee Agreements with Indiezone contain the identical
 10 provision compelling “mandatory and exclusive binding arbitration of any controversy or claim
 11 arising out of, or relating to, this Agreement or any breach hereof....” (Rooke Decl., Ex. A, ¶ 7;
 12 Rogness Decl., Ex. A, ¶ 7.) “Agreements to arbitrate are valid, irrevocable, and enforceable, save
 13 upon such grounds as exist at law or in equity for the revocation of any contract.” *Morvant*, 870 F.
 14 Supp. 2d at 836 (citing 9 U.S.C. § 2)). Therefore, they may only be invalidated by generally
 15 applicable contract defenses, such as fraud, duress, or unconscionability. *Id.*
 16

17 Here, Indiezone cannot challenge the validity of Rooke and Rogness’ Employee Agreements
 18 because it is suing for breach of those very same agreements. (*See, e.g.*, Compl. ¶¶ 116-21, 148-53,
 19 160-62, 169-74, 180-82, 452-55.) A party cannot bring suit based on a contract with an arbitration
 20 provision and simultaneously avoid that provision. *Marzocchi v. Tara Tiger, Inc.*, No. 12-cv-4433,
 21 2013 U.S. Dist. LEXIS 39677, at *8-9 (N.D. Cal. Mar. 21, 2013) (“Plaintiff has sued for breach of
 22 contract—she cannot have it both ways. Either there was an enforceable contract or not; if so, she is
 23 bound by all its terms including the arbitration agreement.”). Therefore, this Court should have no
 24 difficulty finding that Indiezone has valid agreements to arbitrate with Rooke and Rogness.
 25

26 ⁷ In moving to arbitrate the claims, Rooke and Rogness in no way concede their validity.
 27 However, they move to compel arbitration in lieu of moving to dismiss because the latter would risk
 28 waiver of their right to arbitrate. *See Edwards v. First Am. Corp.*, No. 07-03796, 2012 U.S. Dist.
 LEXIS 174957, at *32-33 (C.D. Cal. Nov. 30, 2012).

1 **C. The Entire Dispute Between Indiezone and Rooke and Rogness Falls Within the**
 2 **Broad Scope of the Arbitration Clause.**

3 An arbitration clause “embraces every dispute between the parties having a significant
 4 relationship to the contract regardless of the label attached to the dispute.” *Simula*, 175 F.3d at 720
 5 (citation omitted). Indeed, “‘to require arbitration, the allegations of the complaint need only ‘touch
 6 matters’ covered by the agreement containing the arbitration provision, and ‘all doubts are to be
 7 resolved in favor of arbitrability.’” *Ulbrich*, 887 F. Supp. 2d at 931 (quoting *Simula*, 175 F.3d at
 8 721). In the arbitration provision of the Employee Agreements with Rooke and Rogness, Indiezone
 9 chose the broadest, “arising out of, or relating to” language. (Rooke Decl., Ex. A, ¶ 7; Rogness
 10 Decl., Ex. A, ¶ 7.) “[W]hen parties intend to include a broad arbitration provision, they provide for
 11 arbitration ‘arising out of or relating to’ the agreement.” *Cape Flattery Ltd. v. Titan Mar., LLC*, 647
 12 F.3d 914, 922 (9th Cir. 2011); *see also Simula*, 175 F.3d at 721 (“Every court that has construed the
 13 phrase ‘arising in connection with’ in an arbitration clause has interpreted that language broadly....
 14 [This language] reaches every dispute between the parties having a significant relationship to the
 15 contract and all disputes having their origin or genesis in the contract.”). Here, Indiezone
 16 intentionally drafted the broadest possible arbitration clause.

17 Every one of Indiezone’s causes of action “arises out of” or “relates to” the Employee
 18 Agreements or breach thereof. In fact, every count in the Complaint relies on the allegation that
 19 Rooke and Rogness misappropriated Indiezone’s intellectual property, (Compl. ¶¶ 266-492; *see also*
 20 Baudry Decl., Ex. A), and Indiezone bases these claims on the allegation that this violated Rooke
 21 and Rogness’ “Agreements,” (*see, e.g.*, Compl. ¶¶ 116-21, 148-53, 160-62, 169-74, 180-82, 452-
 22 55).⁸

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 26 ⁸ Plaintiffs’ use of “Agreements” includes Rooke and Rogness’ “Employee Agreement,”
 27 “Employee Invention Assignment and Confidentiality Agreement,” “Confirmatory Assignment
 28 Agreement” and “Stock Purchase Agreement.” (Compl. ¶ 116.) The Employee Agreement contains
 the arbitration clause and also references and incorporates the Employee Invention Assignment and
 Confidentiality Agreement and Stock Purchase Agreement. (Rooke Decl. Ex. A ¶¶ 3, 4 & 7;
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1 According to the Plaintiffs' own allegations, the purported scheme to misappropriate
 2 Indiezone's intellectual property directly violated Rooke and Rogness' Employee Agreements with
 3 Indiezone, which required "secrecy-non-disclosure-confidentiality, non-circumvention, non-
 4 competition, non-use, assignment and disclosure of all developed and to be developed IP." (Compl.
 5 ¶ 117.) "Plaintiffs rel[ied] on the Agreements in providing [Rooke and Rogness] with access to their
 6 IP-Property." (*Id.* ¶ 121.) But, according to Plaintiffs, "[a]t all times material hereto, ... although
 7 Defendants Rooke and Rogness had agreed to abide by the terms of their written Agreements[,]
 8 specifically ... the terms of secrecy in the development and deployment of Plaintiffs' Property as
 9 well as assignment of ideas and acknowledgement of authorship, each had agreed to move forward
 10 with the theft of Plaintiffs' IP...." (*Id.* ¶ 152.) "Thereafter, in contravention of ... their written
 11 employment and secrecy Agreements, ... Rooke and Rogness [took] several overt and predicate acts
 12 intending to execute their plan...." (*Id.* ¶ 153.)

15 All of Indiezone's claims are based upon the central allegation that Rooke and Rogness
 16 misappropriated its intellectual property in direct violation of the parties' Employee Agreement.
 17 Therefore, by definition, all of the claims arise out of or relate to the Employee Agreements or
 18 alleged breaches thereof. The Court should compel arbitration of all Indiezone claims against Rooke
 19 and Rogness pursuant to the arbitration clause in the Employee Agreements.

20 **II. This Court Should Dismiss Plaintiff eoBuy Because It Lacks Capacity to Bring Suit.**

22 It has long been the law that the dissolution of a corporation ends its existence and its
 23 capacity to bring claims. *See, e.g., Chicago Title and Trust Co. v. Forty-One Thirty-Six Wilcox Bldg.*
 24 *Corp.*, 302 U.S. 120, 124-5 (1937) ("[A] private corporation in this country can exist only under the
 25 express law of the state or sovereignty by which it was created. Its dissolution puts an end to its
 26 existence, the result of which may be likened to the death of a natural person."); 16A Carol A. Jones,

28 Rogness Decl. Ex. A ¶¶ 3, 4 & 7.)

1 *Fletcher Cyclopedie Corporations* § 8142 at pp. 306-07 (2012) (“Once a dissolved corporation has
 2 finished winding up its affairs, its existence generally has terminated and it loses its power to sue and
 3 be sued.”).

4 In light of this black letter law, a court must dismiss any action by a dissolved corporation
 5 because, by definition, the defunct corporation lacks the capacity to sue or be sued. *See Community*
 6 *Electric Service, Inc. v. National Electrical Contractors Ass'n*, 869 F.2d 1235, 1239 (9th Cir. 1989)
 7 (affirming dismissal because delinquent corporation lacked capacity to sue); *Levin Metals Corp. v.*
 8 *Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987) (affirming dismissal of suit
 9 because dissolved corporation lacked capacity to be sued). Defendants properly raise lack of
 10 capacity in Rule 12 motions because courts may take judicial notice of public records evidencing
 11 dissolution of a corporation without converting the motion to one for summary judgment. *Lewis v.*
 12 *Russell*, 838 F. Supp. 2d 1063, 1067 n.3 (E.D. Cal. 2012) (taking judicial notice of public record
 13 showing dissolution of company and granting motion for judgment on the pleadings); *Haskins v.*
 14 *Fuller-O'Brien, Inc.*, No. 11-cv-05142, 2013 U.S. Dist. LEXIS 60912, at *4 n.2 (N.D. Cal. Apr. 26,
 15 2013) (taking judicial notice of public record showing dissolution of company and granting Rule
 16 12(b)(6) motion to dismiss); *see also Levin Metals*, 817 F.2d at 1451 (affirming Rule 12(b)(6)
 17 dismissal of suit against dissolved corporation).

18 Federal Rule of Civil Procedure 17(b)(2) provides that a corporation’s capacity to sue is
 19 determined by the law under which it was organized; this is true for both domestic and foreign
 20 corporations. *Community Electric Service*, 869 F.2d at 1239 and *Levin Metals*, 817 F.2d at 1451
 21 (California law); *Healthtrac, Inc. v. Sinclair*, 302 F. Supp. 2d 1125, 1127 (N.D. Cal. 2004)
 22 (Canadian law). Thus, if a foreign corporation lacks capacity to sue under the law of the country in
 23 which it was organized, a United States District Court shall dismiss it from the case. *See Alosio v.*
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1 *Iranian Shipping Lines, S.A.*, 426 F. Supp. 687, 690 (S.D.N.Y. 1976) (dismissing corporation for
 2 lack of capacity to sue because it was dissolved under Iranian law).

3 EoBuy's capacity to sue is governed by Irish law because, as it admits, it is an Irish
 4 corporation. (Compl. Caption, p. 1 & ¶ 26.) “The court, in determining foreign law, may consider
 5 any relevant material or source, including testimony, whether or not submitted by a party or
 6 admissible under the Federal Rules of Evidence.”” *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d
 7 1036, 1038 (9th Cir. 1999) (quoting Fed. R. Civ. P. 44.1). Despite the numerous means through
 8 which a court may ascertain foreign law, “expert testimony accompanied by extracts from foreign
 9 legal materials has been and will likely continue to be the basic mode of proving foreign law.” *Id.*
 10 A court may properly consider parties’ declarations regarding foreign law on a motion to dismiss.
 11 *See Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2012 U.S. Dist. LEXIS 67102, at *37-39
 12 (N.D. Cal. May 14, 2012) (relying on parties’ declarations regarding foreign law on motion to
 13 dismiss); *Eshelman v. Orthoclear Holdings, Inc.*, No. C 07-1429, 2009 U.S. Dist. LEXIS 19293, at
 14 *28-29 (N.D. Cal. Feb. 27, 2009) (taking judicial notice of and relying on foreign law in granting
 15 motion to dismiss).

16 In this case, the moving Defendants submit the declaration of an Irish Barrister, Brian
 17 Walker, confirming (1) eoBuy is officially and publicly listed as a dissolved corporation by Ireland’s
 18 Registrar of Companies, and (2) under Irish law, a dissolved corporation has no legal existence and
 19 may no longer carry on business, enter into contracts or participate in litigation. (Walker Decl. ¶¶ 5-
 20 9, Exs. A & B). The Court need not just rely on the Irish public record attached to Barrister
 21 Walker’s declaration but may independently confirm eoBuy’s dissolved status online through the
 22 Irish Registrar’s public website, available at www.cro.ie/search. (Walker Decl., ¶ 6.) Because
 23 eoBuy is dissolved and lacks capacity to sue under Irish law, it, and all claims it asserts, should be
 24 dismissed.

1 **III. Alternatively, This Court Should Compel eoBuy to Arbitrate Because It Was a Joint
2 Venturer With Indiezone and Its Claims are Based on the Employee Agreements That
3 Mandate Arbitration.**

4 Although eoBuy is not a signatory to Indiezone's Employee Agreements with Rooke and
5 Rogness, under both agency and estoppel principles, the Ninth Circuit and California Federal
6 District courts have repeatedly compelled non-signatory plaintiffs to arbitrate with signatory
7 defendants where the non-signatory plaintiff brings claims based on the agreement *or* where the non-
8 signatory plaintiff has an agency relationship with the signatory plaintiff. *Pullen v. Victory*
9 *Woodwork, Inc.*, No. 2:07-CV-00417, 2007 U.S. Dist. LEXIS 46573, at *7 (E.D. Cal. June 27, 2007)
10 (citing *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) and *Letizia v. Prudential Bache*
11 *Sec., Inc.*, 802 F.2d 1185 (9th Cir. 1986)). Here estoppel and agency would each independently
12 require eoBuy to arbitrate the claims it jointly is prosecuting with Indiezone both because eoBuy
13 seeks to vindicate rights under the employee agreements containing the arbitration clause and
14 because it admits a joint venture relationship with Indiezone.
15

16 **A. EoBuy Would Be Compelled to Arbitrate Claims Against Rooke and Rogness
17 Under an Estoppel Theory.**

18 The Ninth Circuit has made clear that non-signatory plaintiffs who assert rights under
19 agreements containing arbitration clauses are also bound by those clauses by equitable estoppel.
20 *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) ("Equitable estoppel precludes a
21 party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens
22 that contract imposes.") (citation omitted). For example, just this year in *Peck Ormsby Constr. Co.*
23 *v. City of Rigby*, the Ninth Circuit reversed an Idaho district court's denial of a motion to compel a
24 non-signatory cross-claimant to arbitrate on estoppel grounds where the non-signatory based its
25 claims on the agreement containing the arbitration clause "[e]ven though the [non-signatory cross-
26 claimant] never signed the [agreement], it cannot accept its benefits and at the same time question its
27 validity.... By suing, the [non-signatory] now seeks to further enjoy the benefits of the [agreement],
28

1 yet avoid its burdens by refusing arbitration. This it cannot do.” 526 Fed. Appx. 769, 770 (9th Cir.
 2 2013) (citation omitted); *see also Larson v. Speetjens*, No. C 05-3176, 2006 U.S. Dist. LEXIS
 3 66459, at *14-24 (N.D. Cal. Sept. 1, 2006) (holding non-signatory plaintiff estopped from avoiding
 4 arbitration “when he has consistently maintained that other provisions of the same contract should be
 5 enforced to benefit him” and “Plaintiffs’ claims are inextricably intertwined with the Agreements”)
 6 (citation omitted); *Pullen*, 2007 U.S. Dist. LEXIS 46573, at *8 (compelling non-signatory to
 7 arbitrate because “[w]hen a nonsignatory seeks to enforce provisions of a contract to which it was
 8 not a party, equitable estoppel must prevent [sic] that entity from avoiding the obligations and
 9 burdens that also exist under the contract.”).⁹

10
 11 EoBuy is estopped from refusing to arbitrate because it brings the exact same claims as
 12 Indiezone seeking to vindicate the alleged breaches by Rooke and Rogness of the Employee
 13 Agreements. As explained *supra*, all of the claims are based on alleged misappropriation of
 14 Plaintiffs’ intellectual property, which both Indiezone and eoBuy claim violates Rooke and Rogness’
 15 agreements. Thus, Eobuy itself wraps itself in the mantle of the protections of the Rooke and
 16 Rogness employee agreements with Indiezone. EoBuy alleges Rooke and Rogness “executed copies
 17 of the Plaintiff Corporations’ [employee agreements]” (Compl. ¶ 116), which protected “Plaintiffs’
 18 joint IP-Property” and created “fiduciary duties … to Plaintiff Corporations,” (Compl. ¶ 115)
 19 (emphasis added). Allegedly, “Plaintiffs [relied] on the Agreements in providing [Rooke and
 20 Rogness] with access to their IP-Property.” (*Id.* ¶ 121) (emphasis added).¹⁰
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 22

23
 24 ⁹ These cases are distinguished from those in which a *non-signatory defendant* attempts to
 25 compel a *signatory plaintiff* to arbitrate, which the Ninth Circuit has rejected because the plaintiff’s
 26 claims do not rely on or relate to the agreement containing the arbitration clause. *See Murphy v.*
DirecTV, Inc., 724 F.3d 1218, 1229-32 (9th Cir. 2013). Here, signatory Defendants (Rooke and
 27 Rogness) would compel the non-signatory Plaintiff (eoBuy) to arbitrate because eoBuy explicitly
 28 bases its claims on the agreements containing the arbitration clause.

29 ¹⁰ EoBuy also seeks the protections of the employee agreements in another way. Indiezone,
 30 the licensee of eoBuy’s alleged intellectual property, bases its claims on the alleged misappropriation
 31 of eoBuy’s licensed intellectual property. (*See, e.g.*, Compl. ¶¶ 122-23 & 151-53.) To allow eoBuy
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1 The alleged misappropriation, according to eoBuy, violated the employee agreements. (*See,*
 2 *e.g.*, Compl. ¶¶ 116-21, 148-53, 160-62, 169-74, 180-82, 452-55). For example, “although
 3 Defendants Rooke and Rogness had agreed to abide by the terms of their written Agreements[,]
 4 specifically … the terms of secrecy in the development and deployment of Plaintiffs’ Property …
 5 each had agreed to move forward with the theft of Plaintiffs’ IP....” (*Id.* ¶ 152) (emphasis added.)
 6 “Thereafter, in contravention of … their written employment and secrecy Agreements, … Rooke and
 7 Rogness [took] several overt and predicate acts intending to execute their plan....” (*Id.* ¶ 153);
 8 ultimately “illegally deploying Plaintiffs’ IP on the Jingit.com Website,” (*Id.* ¶ 247) (emphasis
 9 added). Indeed, both Indiezone and eoBuy assert the identical breach of contract claim against
 10 Rooke and Rogness only, alleging among other things, breach of the employee agreements caused
 11 “damages to Plaintiffs.” (Complaint, Count XX, ¶¶ 451-455). Eobuy cannot, on the one hand, claim
 12 to be entitled to the protections of the employee agreements while simultaneously seek to disavow
 13 the unambiguous obligation to arbitrate set forth therein. *City of Rigby*, 526 Fed. Appx. at 770;
 14 *Marzocchi v. Tara Tiger, Inc.*, No. 12-cv-4433, 2013 U.S. Dist. LEXIS 39677, at *8-9 (N.D. Cal.
 15 Mar. 21, 2013).

18 **B. EoBuy Would Be Compelled to Arbitrate Its Claims Against Defendants Rooke
 19 and Rogness Under Agency Theory.**

20 “In California, ‘[a] nonsignatory to an agreement to arbitrate may be required to arbitrate …
 21 if a preexisting confidential relationship, such as an agency relationship between the nonsignatory
 22 and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate
 23 upon the nonsignatory.’” *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1232 (9th Cir. 2013) (quoting
 24 *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co.*, 28 Cal. Rptr. 3d 752, 756 (Cal. Ct.
 25 App. 2005)). This Court twice recently compelled arbitration of claims by non-signatory plaintiffs
 26

27 itself to avoid arbitration while its licensee is compelled to arbitrate claims regarding the same
 28 property would be inequitable.

1 when the non-signatory plaintiff had an agency relationship with the signatory plaintiff—specifically
 2 when the two engaged in a joint venture. *Ahtna Gov't Servs. Corp. v. 52 Rausch*, No. C 03-00130,
 3 2003 U.S. Dist. LEXIS 2460, at *31-36 (N.D. Cal. Feb. 18, 2003) (compelling non-signatory
 4 plaintiff to arbitrate because it held itself out as joint venturer with signatory plaintiff and joint
 5 venture constituted agency relationship); *see also Speetjens*, 2006 U.S. Dist. LEXIS 66459, at *24-
 6 28 (holding signatory plaintiff bound non-signatory plaintiff to arbitration clause under agency
 7 principles).

9 Here, the admission by Plaintiffs of an agency relationship between eoBuy and Indiezone is
 10 an independent basis for compelling eoBuy to arbitrate its claims against Rooke and Rogness.
 11 Plaintiffs explicitly say eoBuy licensed its technology, allegedly stolen by Rooke and Rogness, “in a
 12 joint venture ... with a new entity to be named Indiezone.” (Compl. ¶¶ 109-10) (emphasis added).
 13 Elsewhere, Plaintiffs describe Indiezone as a “development division/arm of [eoBuy].” (*Id.* ¶ 90.)
 14 Under *Ahtna*, to the extent eoBuy had capacity to sue, Plaintiffs’ self-described “joint venture” or
 15 “development arm” relationship constitutes an agency relationship and compels eoBuy to arbitrate
 16 along with Indiezone. *Ahtna*, 2003 U.S. Dist. LEXIS 2460, at *31-36.

18 **IV. This Court Should Stay Proceedings As to All Remaining Defendants.**

19 The Federal Arbitration Act directs that district courts, after compelling arbitration, “shall on
 20 application of one of the parties stay the trial of the action until such arbitration has been had in
 21 accordance with the terms of the agreement.” 9 U.S.C. § 3. A court may additionally stay
 22 remaining claims between parties not subject to the arbitration agreement. *Swift v. Zynga Game*
 23 *Network, Inc.*, 805 F. Supp. 2d 904, 917 (N.D. Cal. 2011) (quoting *Moses H. Cone Memorial*
 24 *Hospital*, 460 U.S. at 20-21, n.3 (“It may be advisable to stay litigation among the nonarbitrating
 25 parties pending the outcome of the arbitration.”)). “In deciding whether to stay non-arbitrable
 26 claims, a court considers economy and efficiency, the similarity of the issues of law and fact to those
 27 claims, a court considers economy and efficiency, the similarity of the issues of law and fact to those
 28

1 that will be considered during arbitration, and the potential for inconsistent findings absent a stay.””
 2 *Randhawa v. Skylux, Inc.*, No. 2:09-2304, 2010 U.S. Dist. LEXIS 113131, at *9 (E.D. Cal. Oct. 15,
 3 2010) (quoting *Wolf v. Langemeier*, No. 2:09-CV-03086, 2010 U.S. Dist. LEXIS 87017, at *22
 4 (E.D. Cal. Aug. 24, 2010)). Here, each of these factors compels the conclusion that the remaining
 5 claims against remaining Defendants should be stayed pending the outcome of the arbitration
 6 determining the fundamental issue of whether Plaintiffs’ intellectual property was misappropriated,
 7 an issue which underpins every claim in the case.
 8

9 This Court routinely stays claims against non-signatories to an arbitration agreement when
 10 they are based on common fact issues and where liability of non-signatories is dependent on that of
 11 signatories. For example, in *Copytele, Inc. v. AU Optronics Corp.*, this Court stayed claims against
 12 non-signatories pending arbitration because plaintiff alleged “concerted action on the part of
 13 [signatory] and [non-signatory] – [thus] rulings made in the [signatory] arbitration clearly have the
 14 potential to simplify the rulings here with respect to the claims against [non-signatory].” No. C-13-
 15 0380, 2013 U.S. Dist. LEXIS 95645, at *7 (N.D. Cal. July 9, 2013); *see also Souza v. Great Am. Ins.*
 16 *Co.*, No. 13-cv-03361, 2013 U.S. Dist. LEXIS 144913, at *23-24 (N.D. Cal. Oct. 7, 2013) (staying
 17 claims against non-signatory “comports with judicial economy and consistency because the [non-
 18 signatory]’s liability was dependent upon the liability of the [signatory], and absent a stay, the
 19 parties would be litigating and arbitrating substantially the same issues.”) (citation omitted); *Tech. &*
 20 *Intellectual Prop. Strategies Group PC v. Insperity, Inc.*, No. 12-CV-03163, 2012 U.S. Dist. LEXIS
 21 170714, at *38-39 (N.D. Cal. Nov. 29, 2012) (staying claims against non-signatory “as arbitration of
 22 any claims against [signatory] are likely to predominate over any individual claims against [non-
 23 signatory], and [signatory]’s defense of these claims may have a preclusive effect over identical
 24 claims raised against [non-signatory]”).
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1 In this case, just as in *Copytele, Souza* and *Insperity*, Plaintiffs' claims against all Defendants
 2 other than Rooke and Rogness are dependent upon the fundamental claim that Rooke and Rogness
 3 misappropriated Plaintiffs' intellectual property. If an arbitrator determines Rooke and Rogness did
 4 not act improperly with respect to the alleged intellectual property, then all claims against all other
 5 Defendants are by definition resolved. It makes no sense to proceed with the rest of the litigation
 6 until the fundamental threshold issue of whether any alleged misappropriating occurred is resolved
 7 through binding arbitration. While the twenty-seven causes of action are alleged against twenty-one
 8 different Defendants, Plaintiffs themselves label twelve of these as "Aiding/Abetting" Defendants,
 9 and three more as "Secondary-Vicarious Infringement" Defendants. (Compl. ¶¶ 36-51.) Plaintiffs'
 10 own characterization of these fifteen Defendants shows their potential liability is wholly dependent
 11 on an adverse finding regarding Rooke and Rogness.¹¹
 12

13 The "Aiding/Abetting" Defendants are alleged to be "vehicles for the illegal activities of the
 14 RICO Defendants in their false claims of ownership to Plaintiffs' IP, and in the operations of the
 15 affairs of the Jingit Enterprise in raising capital and illegally deploying Plaintiffs [sic] IP on the
 16 Jingit.com Website." (*Id.* ¶ 247.) It logically follows that if Rooke and Rogness did not
 17 misappropriate Plaintiffs' alleged intellectual property, the "Aiding/Abetting" Defendants are not
 18 "vehicles" for any illegal behavior and are not "deploying" anyone's property but Jingit's.
 19

20 The "Secondary-Vicarious Infringement" Defendants (also called "nominal Defendants" (*Id.*
 21 ¶ 251)) are merely alleged to have entered into a sponsorship agreement with Jingit, which
 22 "facilitated the infringement of Plaintiffs' IP." (*Id.* ¶ 259-60.) If Rooke and Rogness did not
 23

24
 25 ¹¹ Indeed, in his sworn declaration in support of Plaintiffs' recent motion for an extension of
 26 time to serve the "Secondary-Vicarious Infringement" Defendants, Plaintiffs' counsel himself
 27 explains these Defendants have not been served "for the reason that the forgoing defendants are
 28 nominal as to the claims of the Complaint." (Attorney's Declaration in Support the Motion For An
 Extension of Time to Serve and File Proof of Service Over the Defendants Wal-Mart, General
 Electric, Target, DOE(s) and ROE(s) 1- through 10, ECF 20, ¶ 4.)

1 misappropriate Plaintiffs' alleged intellectual property in their operation of Jingit, the "Secondary-
 2 Vicarious Infringement" Defendants are not "facilitating" infringement.

3 This leaves only Phil Hazel, Sam Ashkar, Holly Oliver and U.S. Bank as the "RICO
 4 Defendants" not compelled to arbitrate with Plaintiffs. (*Id.* ¶¶ 32-35.) However, Plaintiffs' claims
 5 against these Defendants are also wholly dependent on the assertion that Rooke and Rogness
 6 misappropriated intellectual property. Hazel, Ashkar and Oliver are accused of raising funds in
 7 order to form Jingit for the purpose of deploying Plaintiffs' intellectual property, (*see, e.g., id.*
 8 ¶¶ 188 & 201), "promot[ing] the carrying on of the IP theft" and participating in financial
 9 transactions "arising from the theft of Plaintiffs' IP," (*id.* ¶ 200). Rooke and Rogness allegedly
 10 "enter[ed] into a partnership agreement with Defendant US BANK for the purpose of illegally using
 11 Plaintiffs' IP." (*Id.* ¶ 238). Once again, if Rooke and Rogness did not misappropriate Plaintiffs'
 12 alleged intellectual property, the "RICO Defendants'" alleged participation in the operation of Jingit
 13 cannot be a RICO violation.

14 Plaintiffs' very own allegations make clear that all claims against the remaining Defendants
 15 are entirely dependent on a finding that Rooke and Rogness are misappropriating Plaintiffs'
 16 intellectual property in their operation of Jingit. That issue can and must be resolved through
 17 binding arbitration. All other Defendants are accused of participating in the formation and operation
 18 of Jingit. If the arbitrator finds Rooke and Rogness did not misappropriate intellectual property, then
 19 all of the claims against all the remaining defendants fail as a matter of law. Because the claims
 20 against all Defendants are based on the same facts and dependent on those against Rooke and
 21 Rogness, this Court should stay the claims against the remaining Defendants pending arbitration
 22 between Indiezone and Rooke and Rogness.

CONCLUSION

For the foregoing reasons, moving Defendants respectfully ask this Court to compel arbitration between Indiezone and Rooke and Rogness, dismiss eoBuy and stay litigation against the remaining Defendants pending the arbitration.

Dated: January 10, 2014

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